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Federal Communications Commission

DA 00-2492

Before the  
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 Federal Communications Commission  
 Washington, D.C. 20554

In the Matter of )  
 )  
 Implementation of the Subscriber Carrier )  
 Selection Changes Provisions of the ) CC Docket No. 94-129  
 Telecommunications Act of 1996 )  
 )  
 First Communications, LLC )  
 Petition for Waiver )  
 )

## ORDER

Adopted: November 3, 2000

Released: November 6, 2000

By the Associate Chief, Accounting Policy Division, Common Carrier Bureau:

## I. INTRODUCTION AND BACKGROUND

1. In its *Carrier Change Orders*,<sup>1</sup> the Commission adopted rules applicable to carriers changing a consumer's preferred carrier.<sup>2</sup> In this Order, we grant First Communications, LLC (First Communications), a limited waiver of the authorization and verification requirements of the Commission's rules and *Carrier Change Orders*.<sup>3</sup> We grant this limited waiver to the

<sup>1</sup> *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 10674 (1997), Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508 (1998) (*Section 258 Order*); *stayed in part*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. May 18, 1999); *First Order on Reconsideration*, FCC 00-135 (released May 3, 2000), 65 Fed. Reg. 47678 (August 3, 2000); *stay lifted*, *MCI WorldCom v. FCC*, No. 99-1125 (D.C. Cir. June 27, 2000); Third Report and Order and Second Order on Reconsideration, FCC 00-255 (released August 15, 2000); *reconsideration pending*; *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995), *stayed in part*, 11 FCC Rcd 856 (1995); *Policies and Rules Concerning Changing Long Distance Carriers*, CC Docket No. 91-64, 7 FCC Rcd 1038 (1992), *reconsideration denied*, 8 FCC Rcd 3215 (1993) (*PIC Change Recon. Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 F.C.C.2d 911 (*Allocation Order*), 101 F.C.C.2d 935 (*Waiver Order*), *reconsideration denied*, 102 F.C.C.2d 503 (1985) (*Reconsideration Order*) (the *Reconsideration Order* denied reconsideration of both the *Allocation Order* and the *Waiver Order*). We refer to these orders collectively as the *Carrier Change Orders*.

<sup>2</sup> 47 C.F.R. §§ 64.1100 - 64.1190.

<sup>3</sup> On September 28, 2000, First Communications filed a Petition for Waiver (Waiver Petition) relating to First Communications' acquisition of the customer base of ITS Billing, Inc. (ITS). On October 26, 2000, First Communications filed a letter supplementing its Waiver Petition (Supplement), which provides, among other (continued....)

extent necessary to enable First Communications to become the preferred carrier of certain consumers currently presubscribed to ITS, without first obtaining the consumers' authorization and verification.

2. Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such procedures as the Commission shall prescribe."<sup>4</sup> The goal of section 258 is to eliminate the practice of "slamming," the unauthorized change of a subscriber's preferred carrier. Pursuant to section 258, carriers are absolutely barred from changing a customer's preferred local or long distance carrier without first complying with the Commission's verification procedures.<sup>5</sup> In the *Section 258 Order*, the Commission revised its procedures to ensure that carriers obtain the requisite authority prior to changing a customer's preferred carrier. The Commission requires that carriers follow one of the Commission's prescribed verification procedures before submitting carrier changes on behalf of consumers.<sup>6</sup>

3. First Communications seeks a waiver of our verification rules to allow First Communications to be designated the preferred long distance carrier for customers of ITS without first obtaining each customer's authorization and verification. Because we conclude that, under the circumstances presented, it is in the public interest to grant the waiver, we grant First Communications a waiver, subject to the conditions represented in its filings.

## II. DISCUSSION

4. Generally, the Commission's rules may be waived for good cause shown.<sup>7</sup> As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.<sup>8</sup> The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.<sup>9</sup> In addition, the Commission may take into

things, further support for First Communications' petition for waiver and requests expedited treatment of the Waiver Petition.

<sup>4</sup> 47 U.S.C. § 258.

<sup>5</sup> The Commission's rules and orders clearly contemplate that a switchless reseller may be a customer's preferred carrier. Therefore, changes to a customer's preferred carrier that do not involve a change in the customer's underlying facilities-based carrier are nonetheless subject to the Commission's authorization and verification rules. See *Section 258 Order* at paras. 145-146; *WATS International Corp. v. Group Long Distance (USA), Inc.*, 12 FCC Rcd 1743, 1752 (1997) (citing *PIC Change Recon. Order*, 8 FCC Rcd at 3218).

<sup>6</sup> Pursuant to these procedures, a carrier must: (1) obtain the subscriber's written authorization; (2) obtain confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming orders electronically; or (3) utilize an independent third party to verify the subscriber's order. See 47 C.F.R. § 64.1150.

<sup>7</sup> 47 C.F.R. § 1.3.

<sup>8</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

<sup>9</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.<sup>10</sup> Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.<sup>11</sup>

5. We find that First Communications has demonstrated that good cause exists to justify a limited waiver of the Commission's authorization and verification requirements to the extent necessary to enable First Communications to transfer to its own customer base the affected ITS customers. ITS is a switchless reseller providing interexchange services to business and residential customers. First Communications currently operates as the underlying carrier for ITS's interexchange services.<sup>12</sup> In its Waiver Petition, First Communications states that, in May 1999, it entered into an asset purchase agreement with ITS whereby First Communications acquired certain assets of ITS, including ITS's customer base.<sup>13</sup> Pursuant to this agreement, for a transition period of thirteen months, ITS continued to perform billing and customer care functions, and ITS customers continued to be subject to the same rates, terms, and conditions that had been in effect prior to the agreement.<sup>14</sup> According to First Communications, ITS continues to provide long distance service to the affected customers.<sup>15</sup> First Communications asserts that it needs to move those ITS customers to its own billing platform as soon as possible, due to a variety of limitations in the ITS system that have negatively affected those customers and have resulted in lost revenues.<sup>16</sup>

6. We conclude that special circumstances exist to justify a waiver. Without this waiver, the service of some former ITS customers might temporarily be interrupted when ITS ceases providing presubscribed service to customers who fail to respond in a timely fashion to requests for preferred carrier change authorization; those customers might also pay potentially higher casual calling rates after the discontinuance of presubscribed service. We conclude that a waiver of the Commission's carrier change rules and orders is necessary to provide a seamless transition with no disruption of service to the transferred customers.

7. We find that First Communications has demonstrated that a limited waiver of the authorization and verification rules is in the public interest because it will prevent consumers from temporarily losing service or paying significantly higher rates, and because First Communications has agreed to notify the affected customers as described below. First

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<sup>10</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>11</sup> *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

<sup>12</sup> Waiver Petition at 1-2.

<sup>13</sup> Waiver Petition at 2.

<sup>14</sup> Waiver Petition at 2.

<sup>15</sup> See November 3, 2000 Letter from Steven A. Augustino to Magalie Roman Salas, Federal Communications Commission, at 1 (Second Supplement).

<sup>16</sup> Supplement at 1-2.

Communications states that it will undertake a two-step process to notify the affected customers of the transfer.<sup>17</sup> In a first letter, First Communications will inform customers of the proposed transfer and assure them that no charges or rate increases will be imposed as a result of the transfer.<sup>18</sup> First Communications states that it will also advise the affected customers that they can choose a different preferred carrier, should they desire to do so.<sup>19</sup> In addition, customers will be given a toll-free number to call with any questions they may have about the transition.<sup>20</sup> According to First Communications, once the proposed transfer has been consummated, it will notify these customers of that event and reiterate the foregoing information, assurances, and advice.<sup>21</sup> First Communications has agreed that, if the Commission waives its rules to permit First Communications to provide service to ITS's former customers, First Communications will work with the complainants and the Commission to investigate and resolve complaints regarding services provided by ITS.<sup>22</sup> We conclude that these conditions will adequately protect the rights of the transferred customers of ITS.

8. For the foregoing reasons, we grant First Communications a waiver of the authorization and verification requirements of our rules for the limited purposes described above. The grant of this waiver is conditioned upon First Communications' provision of customer notification and handling of complaints, as described above and further detailed in the Waiver Petition and Supplements.

### III. ORDERING CLAUSES

9. Accordingly, pursuant to authority contained in Sections 1, 4, and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 258, and the authority delegated under sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91,

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<sup>17</sup> Waiver Petition at 2-3; Supplement at 2. First Communications filed sample notification letters. *See* Waiver Petition, Attachment A (Post-Transfer Letter); Supplement, Attachment A (Pre-Transfer Letter).

<sup>18</sup> Supplement at 2; Pre-Transfer Letter.

<sup>19</sup> Supplement at 2; Pre-Transfer Letter.

<sup>20</sup> Pre-Transfer Letter.

<sup>21</sup> Waiver Petition at 2-3; Post-Transfer Letter; Supplement at 2.

<sup>22</sup> Supplement at n.2.

0.291, 1.3, the waiver request filed by First Communications, LLC, on September 28, 2000, and supplemented on October 26, 2000, and November 3, 2000, IS GRANTED to the extent indicated herein.

10. IT IS FURTHER ORDERED that this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

*K. Michele Walters*

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